PUTRA PERDANA CONSTRUCTION SDN BHD

v.

AMI INSURANS BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: D5(S2)-22-358-2000]
20 OCTOBER 2004

INSURANCE: *Fire insurance - Repudiation of liability - Condition precedent - Breach - Whether insured in breach of condition precedent - Whether repudiation of liability justified and lawful - Waiver - Estoppel*

The plaintiff/insured had filed a claim against the defendants/insurers for losses arising from a fire that occurred at its project site in Putrajaya. Before the learned judge, the defendants sought to repudiate liability, arguing that the plaintiff had been in breach of the condition precedent of the relevant policy, namely Condition 29 thereof. The plaintiff denied that Condition 29 was a condition precedent, and in any case pleaded that: (i) Condition 29 was vague and incapable of performance; (ii) waiver and estoppel applied against the defendants such that the defendants were barred from relying on Condition 29; and (iii) the defendants could not repudiate liability by virtue of the provisions of the Claims Settlement Guidelines issued by Bank Negara Malaysia ('the BNM Guidelines').

Held (dismissing the claim):

[1] Condition 29 of the policy, read with General Condition 3 thereof, has the effect of making Condition 29 a condition precedent. (p 544 g)

[1a] Where a term in a policy is stipulated to be a condition precedent, the insurer is not liable if the insured is in breach of the condition. The condition, further, needs to be strictly complied with and it is also settled law that the insurer is not required to show that it was prejudiced by the breach. It follows that the breach of Condition 29 *per se*, without more, was sufficient for the defendants to repudiate liability.
(pp 545 d & 547 b)

[2] The plaintiff had been in clear breach of Condition 29. The evidence indicated that there were inadequate fire extinguishers at the building, that the same were not inspected regularly and that there was no regular clearance of waste/inflammable materials from the site. The plaintiff had also not put in place the hot-work-permit-system which the policy

mandated to minimise fire risk. There was thus overwhelming evidence that Condition 29, particularly items 1, 2, 3, 4, 5 & 6 thereof, had been breached. (pp 549 h, 550 d, 551 b, 552 f & 553 c-f)

[3] Looking at Condition 29, each and every requirement therein was capable of being observed and performed. In any case, no evidence was adduced at the trial to show how Condition 29 could have been beyond performance. It was also highly improbable that the parties, being so experienced in the business, would have included Condition 29 in the policy if the terms were incapable of performance. Condition 29, modeled as it were on fire policies of a leading global re-insurer, was also not vague as alleged. (p 554 f)

[4] The plaintiff's reliance on waiver/estoppel was untenable. The defendants had no prior knowledge of the breach of Condition 29, much less full knowledge thereof. This aside, an insurer can always repudiate a claim if there are grounds to do so. It followed that, although the defendants had settled the previous claims of the plaintiff, they were not barred from repudiating any subsequent claim, more so, when, as here, most of the previous claims were trivial in nature and not even fire claims. (p 558 d-g)

[5] Even assuming that the BNM Guidelines had the force of law, the same do not cover the situation in the present case. The breaches here were not 'technical' in nature and therefore the defendants, in repudiating their liability, could not have breached the BNM Guidelines. The defendants had therefore lawfully repudiated liability under the policy. (p 561 d)

Case(s) referred to:

Alder v. Moore [1961] 2 Lloyds Law Report 325 ***(refd)***
Arterial Caravans Ltd v. Yorkshire Insurance Co Ltd [1973] 1 QB 169 ***(refd)***
Chong Kok Hwa v. Taisho Marine & Fire Insurance Co Ltd [1977] 1 MLJ 244 ***(refd)***
Chong Soo Sin v. Industrial & Commercial Insurance (M) Bhd [1992] 1 MLJ 636 ***(refd)***
Condogianis v. Guardian Assurance & Co [1921] AC 125 ***(refd)***
Locker & Company Ltd v. Western Australian Insurance Company Ltd [1936] 54 LLR 211 ***(refd)***
London & Lancashire Fire Insurance Co. v. Boland [1924] AC 836 ***(refd)***
London Guarantee Company v. Fearnley [1880] Vol 5 AC 911 ***(refd)***
Pioneer Concrete (UK) v. National Employers Mutual General Insurance Association Ltd [1985] 1 Llyods 274 ***(refd)***
Victor Melik & Co Ltd v. Norwich Union Fire Insurance Society Ltd [1980] 1 Lloyds Rep 523 ***(refd)***
Woolford v. Liverpool CC [1968] 2 Lloyds Reps 256 ***(refd)***
Yorke v. Yokshire Insurance Company [1918] 1 KB 662 ***(refd)***

Other source(s) referred to:
MacGillivray & Parkington, *On Insurance Law*, 8th edn, p. 448, para. 1091

For the plaintiffs - CS Kumar; M/s Sri Ram & Co
For the defendants - Liew Teck Huat; M/s TH Liew & Partners

Reported by WA Sharif

JUDGMENT

Ramly Ali J:

Facts

The plaintiff was engaged in business as a building contractor. At the material time, the plaintiff was the main contractor of a project known as the Putrajaya Parcel D Project. The principal of the project was Putrajaya Holdings Sdn. Bhd. The project involved the construction of nine units of multi-storey office buildings, with basement car parks. The contract period was stipulated to be from 28 October 1996 to 28 October 1998 (and subsequently extended).

For the purpose of the project, insurance was put in place. This was affected *vide* a Contractors All Risk And Third Party Liability Insurance Policy subscribed by the three defendants. The proportion of risks accepted by the three defendants were as follows:

1st defendant - 50%

2nd defendant - 25%

3rd defendant - 25%

Section 1 of the said policy provides for the ambit of cover in the following terms:

> The insurers will indemnify the insured in respect of physical loss or damage to any of the property described in the schedule arising FROM ANY CAUSE whatsoever not herein otherwise excluded.

The policy includes a special condition concerning fire fighting facilities and fire safety at the construction site. This is Condition 29, which is stipulated to be a "special condition", which provides:

> 29. Special Condition Concerning Fire Fighting Facilities and Fire Safety on Construction Site

It is agreed and understood that otherwise subject to the terms, exclusions, provisions and conditions contained in the Policy or endorsed thereon, the insurer shall only indemnify the insured for a loss or damage directly or indirectly caused by or resulting from fire or explosion, provided always that:

1. With regards to the progress of work adequate fire fighting equipment and sufficient extinguishing agents are available and operative at all times.

   Fully operative wet riser hydrants are installed up to one level below the hires current work level are sealed by temporary end caps.

2. The cabinets containing hose reels and portable fire extinguishers are inspected at regular intervals but at least twice a week.

3. Fire compartments required by local regulations are installed as soon as possible after the removal of formwork.

   Opening for lifts shafts, services ducts and other voids are provisionally closed as soon as possible but not later than at the commencement of fit out work.

4. Waster material is removed regularly. All floor undergoing fit out are cleared of combustible waste at the end of each working day.

5. A "Permit to work" system is implemented for all contractors engaged in "hot work" of any kind such as not limited to:

   - grinding, cutting or welding operation
   - use of blow lamps and torches
   - application of hot bitumen or any other heat producing operation

   "Hot work" is carried out only in the presence of at least one worker equipped with a fire extinguisher and trained in fire-fighting.

   The area of any "hot work" is examined one hour after the work has finished.

6. Storage of materials for the construction or erection shall be subdivided into storage not exceeding the value stated below per storage unit. The individual storage unit shall be either at least 50 m apart or separated by fire-proof walls.

   All inflammable material and especially all inflammable liquids and gases shall be stored at a sufficiently large distance from the property under construction or erection and any hot work.

7. A Site Safety Coordination is appointed.

- A reliable fire alarm system is installed and whenever possible a direct communication link maintained with the nearest fire brigade.

- A fire Proteciton Plan and a Site Fire Action Plain are implemented and updated regularly. The contractor's personnel are trained in fire fighting and fire fighting drills carried out weekly.

- The nearest fire brigade is familiarised with the site and immediate access maintained for it at all times.

8. The site is fenced off and access controlled.

Value per storage: RM5,000,000.00.

On 16 August 1999 at about 4.30 p.m. a fire broke out at the basement car park of Block D10, which was still under construction. The fire spread rapidly and resulted in considerable damages. The Bomba was promptly called and arrived at site at about 4.45 p.m. At about 8.30 p.m. the fire was extinguished. Following the fire incident, the Fire Department issued a report containing various findings as to the possible causes of the fire and recommendations.

As a result of the fire, the plaintiffs issued a notification of claim against the defendants. On 17 August 1999 the defendants appointed loss adjustors, Maphilindo Brocklehurst Sdn Bhd, to conduct investigations and adjustment on the matter. On or about 3 September 1999, Maphoilindo's appointment was revoked and in its place, the defendants appointed Thomas Howell Group (M) Sdn. Bhd. to act. Thomas Howell conducted extensive investigations and issued several reports.

Due to the extensive fire, forensic experts were also appointed to assist in the investigations. These experts were from Forensic Services (M) Sdn. Bhd. Following, the investigations, Forensic Services issued a report dated 11 October 1999 setting out their findings.

On 1 March 2000 the 1st defendant issued a letter addressed to the insurance brokers, giving notice of repudiation of liability under the policy. The ground of repudiation was the breach of Condition 29 and substantial details were given of the various breaches relied on. On 26 May 2000 the plaintiffs commenced this action claiming loss and/or damages suffered as a result of the repudiation of liability by the defendants under the policy. On 8 July 2000

the defendants filed and delivered a defence in response to the claim instituted by the plaintiffs. The plaintiffs filed a reply on 10 October 2000. Prior to commencement of trial, the 2nd defendant elected to settle and as such, had since ceased to be involved with this action. The settlement and consequential withdrawal of the claim against the 2nd defendant was strictly without prejudice to the right of the 1st and 3rd defendants to maintain their repudiation and resist the plaintiff's claim in this action.

The Plaintiff's Claim

In the statement of claim, the plaintiff's case is pleaded simply on the basis that they are entitled to be indemnified for the loss under the policy, due to the damage sustained by reason of the fire. As such, to the plaintiff, the repudiation of liability by the defendants was wrongful.

Case For The Defence

The defence is principally predicated on Condition 29. The defence contended that Condition 29 is a condition precedent by reason of the effect of general Condition 3 in the policy which provides:

> All terms, exemptions and conditions contained herein or endorsed hereon
>
> (a) are incorporated in and from part of this policy;
>
> (b) are to be deemed **conditions precedent** to any liability on the part of the insurers so far as they relate to anything to be done by the insured.

The case for the defence is that the plaintiffs failed to comply with or otherwise, had breached the provisions of Condition 29 of the policy. Accordingly, since Condition 29 of the policy is a condition precedent and there were non-compliance and/or breach of this condition, the defence contended that, no liability attached under the policy and therefore the defendants' are entitled to repudiate liability.

In the response to the defence, the plaintiff filed a reply in which they essentially contended as follows:

(i) Condition 29 was incapable of performance since works were on going at the project site and at various stages of completion;

(ii) Condition 29 is vague and ambiguous;

(iii) the plaintiff had made reasonable compliance with Condition 29;

(iv) the defendants were estopped from and/or had waived their rights to rely on Condition 29 because:

(a) the defendants had knowledge of the breaches from the report of Asia Pacific Risk Management Centre Sdn. Bhd;

(b) the defendants had settled fire claims previously brought by the plaintiff;

(c) the defendants had authorised the plaintiffs to proceed with repair works and represented that an interim payment was forthcoming; and

(d) Condition 29 was not material to the loss.

Earlier the court had directed that the trial should determine the issue of liability first. Therefore this grounds of judgment accordingly is limited to the issue of liability. In this regard, only the evidence of SP1 to SP8 and SP13 (for the plaintiff) and SD1 to SD5 (for the defendants) are relevant for consideration at this stage.

Issues

Having regard to the matter raised in the respective pleadings filed by the parties the following issues fall for determination by the court:

(i) Whether Condition 29 is a condition precedent, especially in view of General Condition 3 of the policy;

(ii) Whether the plaintiff had to comply with or had otherwise breached the provisions of Condition 29;

(iii) Whether the defendants were estopped from relying or have waived their rights to rely on Condition 29 to repudiate liability under the Policy.

Issue 1: Whether Condition 29 Is A Condition Precedent, Especially In View Of General Condition 3 Of The Policy

Condition 29 clearly stipulates that the plaintiff was required to comply with and observe various fire safety measures in carrying out work in the project. A quick perusal of General Condition 3 will illustrate without doubt that Condition 29 is a condition precedent. Reading Condition 29 together with General Condition 3 clearly indicates that Condition 29 is a condition precedent to any liability that may arise under the policy. It is a well-established rule of construction of a policy of insurance that the entire policy should be considered. On this basis, where a particular general clause (i.e. General Condition 3) provides that all conditions (including Condition 29) are to be

treated as condition precedent, then effect must be given to this. The learned author of *MacGillivray & Parkington On Insurance Law* (8th edn) at p. 448 para. 1091, states, *inter alia*, the followings:

> Where there is doubt as to the meaning of a clause or phrase, the whole of the policy should be examined in order to see what intention the parties appear to have had concerning the matters governed by the words in question ... .

Quite apart from interpreting the meaning of words and phrases used in a policy, it is also clear that where a clause appearing in one part of the policy is to be read with another clause in a different part of the policy, this should be done to give effect to intention of the parties. Thus, it is clear in the present case that Condition 29 must be read with General Condition 3 and this undoubtedly will have the effect of making Condition 29, as a condition precedent. This is how the conditions ought to be interpreted.

What Is The Effect Of A Condition Precedent?

Where a term in a policy is stipulated to be a condition precedent, the insurer is not liable under the policy if the insured is in breach of the term of the condition. This is because compliance with the term has been made a condition precedent before the liability of the insurer arise under the policy. This proposition is illustrated in the case of *London Guarantee Company v. Fearnley* [1880] Vol 5 AC 911 a decision of the House of Lord. In that case, among the terms in the insurance policy was one which provided:

> That the employer shall, if and when required by the company … use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) which he shall have committed, and inconsequence of which a claim shall have been made under the policy ... .

The policy (in that case) also provides that the insurance cover was subject to all the conditions of the policy "which shall be conditions precedent to the right on the part of the said employer (the insured) to recover under the policy.

A claim for loss was made by the insured under the policy. However, it was revealed that the insured did not pursue criminal prosecution against the employee, which was in breach of the condition precedent referred to above. The House of Lords held that the insured was not entitled to recover under the policy until he had complied with the condition precedent. The following words of Lord Watson are instructive:

> When the parties to the contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation, ought, in my opinion, to receive effect, unless it shall appear to be either so capricious and unreasonable that a Court of Law ought not to enforce it, or to be sua natura incapable of being made a condition precedent.

In the present case, General Condition 3 of the policy stipulates that **all** conditions of the policy are to be regarded as condition precedent. Therefore clear that if there is non-compliance with Condition 29, no liability arises under the policy.

When a term in a policy is stipulated to be a condition precedent to the liability of the insurer, the condition has to be strictly complied with by the insured before the insured is entitled to bring a claim on the policy. This proposition is illustrated in the case of *Chong Kok Hwa v. Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244. In that case the court held that when a term in an insurance policy was stipulated to be a condition precedent to the liability of the insurer, the insurer was not liable under the policy unless the term has been strictly complied with by the insured. His Lordship Ajaib Singh J said:

> The appellant was required to give notice of the accident to the Respondent as soon as possible after its occurrence under one of the condition in the policy. Another condition provided that every notice or communication to be given or made under the policy should be delivered in writing to the Respondents … The obligation on the part of the appellant to give notice of the accident and to deliver the notice in writing to the Respondents had to be satisfied before the Respondents could became liable under the policy for it is expressly stated in the policy that the due observance and fulfillment of the term as of the policy is so far as they relate to anything to be done by the appellant shall be condition precedent to any liability of the Respondents to make payment under the policy.

It is well settled that where an insurer seeks to repudiate liability for a breach of a condition precedent by the insured, the insurer is not required to show that he has been prejudiced by the breach. This is consistent with the position relating to warranties as well. It is trite that warranties have to be strictly complied with, like conditions precedent. Therefore, if there is a breach of warranty entitling the insurer to repudiate liability, it matters not if the breach has no bearing or connection with the loss. In *Pioneer Concrete (UK) v. National Employers Mutual General Insurance Association Ltd.* [1985] 1 Llyods 274, the insured contended that for the insurer to rely on a breach of condition precedent to repudiate liability, he must first show that he has been prejudiced by the breach. This argument was rejected by the court. Bingham J ruled:

> The Plaintiffs submit that even if there was a breach of condition (i), the insured cannot rely on it without showing prejudice. This is, I think, as stated, a surprising proposition ... On ordinary principles of contract, it would seem to me that the insurer could rely on this breach of condition whether the breach caused him prejudice or and whether the refusal of payment in these circumstances was

> in general terms meritorious or unmeritorious … I find no support in many later authorities for the requirement of prejudice and, as a matter of general contractual principles, it appears to me that this cannot be required of an insurer before he relies on a breach of a condition precedent in the policy.

In the present case, the defendants need not show that the breach to comply with Condition 29 by the plaintiff has prejudiced them. As such, the breach of or non-compliance with Condition 29 (a condition precedent), without more, is sufficient for the defendants (as insurer) to repudiate liability under the policy.

Reasons Behind Condition 29

Before alluding to the various facts which form the substratum of the defendants' case that Condition 29 had been breached, it is appropriate at this stage to first, understand why Condition 29 was introduced in the first place. This can be gathered from the evidence of Zakri Mohd Khir, who was at the material times, the general manager in he 1st defendant. Zakri Mohd Khir is his evidence states as follows:

> The reason for the need to incorporate an explicit condition or fire safety measure was that there had been a number of cases where fire had been the cause of considerable loss and damage in major construction projects. It was the general view of the industry that fire prevention and safety measures were not sufficiently practiced or observed. As such, for insurers, it was decided that clear and explicit fire warranties were necessary.

Hence, the introduction of Condition 29 into the policy in the present case. In fact, Zakri Mohd Khir's evidence was that fire conditions such as Condition 29 were first used in the policy documents of Munich Re (a leading global reinsurance company) and is still used throughout the world. Significantly, when the 1st defendant tendered for the Putrajaya Project to provide insurance coverage, Condition 29, was incorporated into the policy wordings and this was accepted by the brokers. The brokers represented the plaintiff in all aspects of the insurance placement. As such, it is clear that the plaintiff agreed and assented to the incorporation of Condition 29. It is not contended otherwise by the plaintiff.

Issue 2: Whether The Plaintiff Failed To Comply With Or Had Otherwise Breached The Provisions Of Condition 29

On the evidence, there was clearly a breach of Condition 29 by the plaintiff.

The evidence of Neil Davies, a loss adjustor with Thomas Hawell Group, shows that he attended the site and personally carried out surveys and investigations. From his investigation he prepared several reports. The most critical of these, concerning the issue of Condition 29, is the report dated 18 September 1999. It is significant that Neil Davies carried out site inspection and issued a

contemporaneous report. As such the findings in his reports should be regarded as *prima facie* accurate. In his reports of 18 September 1999 Neil Davies set out in detail his findings with precise focus on the issues relating to compliance or otherwise with the requirements of Condition 29.

The investigation was precisely with Condition 29 in mind and therefore sufficient weight should be accorded to the findings. In carrying out the investigations Neil Davies specifically explored the very areas contemplated by Condition 29.

Item 1 of Condition 29, stipulates that with regards to the progress of work, adequate fire fighting equipment and sufficient extinguishing agents are available and operating at all times. Neil Davies's evidence indicates in clear terms that there were inadequate fire extinguisher equipments. He physically inspected the buildings at the project site to determine if there were sufficient fire extinguishers. He enquired with Mohan Ram (plaintiff's safety officer) on the status of the fire extinguishers at the basement. The answer he received was in conclusive. He was unable together more than what Mohan Ram told him as the basement was considerably damaged. Neil Davies conducted a physical inspection of buildings D4 and D5 which were at more advanced stated of completion than the basement car park. His physical inspection of these buildings produced astonishing findings. In building D4, there was not one single fire extinguisher. At D5 building he found one (1) fire extinguisher and even that was discharged and therefore not functional. The conspicuous absence of fire extinguishers at the site clearly constitutes a breach of item 1 of Condition 29.

Neil Davies was not seriously shaken in cross-examination. He conducted inspection personally with the trained eyes of an experienced loss adjustor. In his investigations, Neil Davies also interviewed Mr. Gan Peng Teng and Mr. Choo King Hwa. Mr. Gan Peng Teng was the plaintiffs' Senior Project Manager. He would therefore have been overall in-charge and able to provide information relating to the project. Unfortunately, he was not called as a witness by the plaintiffs. Mr. Choo King Hwa (his subordinate) was called as a witness by the plaintiffs, but his evidence on fire extinguishers was almost non-existent.

As far back as in October 1999, the plaintiff had already been notified of their breach of Condition 29 (*vide* letter dated 25 October 1999). The plaintiff had therefore ample time and opportunity to present evidence and documents to rebut the allegation of breach. The plaintiff issued two letters dated 23 November 1999 and 17 December 1999 signed by Mr. Gan Peng Teng,

the senior project manager of the plaintiffs. In these 2 letters, a part from issuing a bare assertions of compliance with Condition 29, no documents whatsoever was produced to support the assertions. Surprisingly, Mr. Gan Peng Teng was never called as a witness by the plaintiffs.

The plaintiff's safety officer, Mohan Ram, as can be seen in his testimony, was not even sure how many fire extinguishers there were, at the project site.

It is completely shocking for a safety officer not to be able to say as a matter of personal knowledge, how many fire extinguishers the plaintiffs had, as this was an integral part of fire safety measure. The following evidence from Mohan Ram is revealing:

(i) he claimed there were 10 fire extinguishers in the basement car park of Block D10. On further cross-examined he suggested there were 12;

(ii) he hesitated long and hard when he was asked to mark the location of the fire extinguishers in the basement car part at D10;

(iii) he said, after use the fire extinguishers would be recharged. But he did not know of any record of recharging;

(iv) he only suggested that there were 72 fire extinguishers when some documents were shown to him. He had no personal knowledge of these documents. In any event the assertion that there were 72 fire extinguishers contradicts Mr. Gan's letter dated 17 December 1999 which indicates at most only 50;

(v) he also claimed in cross-examination he did not remember how many fire extinguishers were there at D4. Neil Davies said he saw none.

The court is satisfied that Mohan Ram's evidence on the number of fire extinguishers at the project site is totally unreliable. Other then Mohan Ram, the plaintiff called no other witnesses to testify on the number of fire extinguishers and how these were placed at the project site. Significantly no one from the equipment department (such as store manager or supervisor) was called by the plaintiff. These witnesses would have been able to rebut effectively Neil Davies evidence that he saw no fire extinguishers at all in Block D4 and only one (1) in Block D5. The documents produced by the plaintiff are far from sufficient in proving that there were sufficient extinguishers at the site. Therefore on the balance of probabilities the court is satisfied that the plaintiffs failed to comply with item 1 of Condition 29, in having sufficient fire extinguishers at the project site.

Item 2 of Condition 29 provides that the cabinet containing hose reels and portable fire extinguishers are to be inspected at regular interval but at least twice a week. Neil Davies's evidence indicates that the fire extinguishers were inspected once every two week, contrary to Condition 29 which requires inspection to be conducted twice weekly. Mohan Ram however suggested in his evidence that the inspection was conducted 'regularly'. For a person who could not even remember how many fire extinguishers the project site had and where they were located, Mohan Ram's claim of 'regular' inspection must surely be treated with extreme caution. Mohan Ram claimed he checked the fire extinguishers himself with three other subordinates. None of these subordinates were called to corroborate his evidence. Further, if these were regular inspection, there would have been records. Apart from Mohan Ram's bare assertion, no such records were produced. Mohan Ram contradicted what Mr. Gan Peng Teng said in his letter dated 17 December 1999 that the fire extinguishers wee inspected only once in a fortnight, and not twice a week as required by Condition 29 and this clearly constitutes a breach of item 2 of Condition 29.

Item 4 of Condition 29 provides that waste material is to be removed regularly and all floor undergoing fit out work are to be cleared of combustible waste at the end of each working day.

Neil Davies reported from his own physical inspection that not all waste materials were removed on a daily basis. He also reported that the worse affected location in term of housekeeping were the basement areas and this of course included the basement car park where the fire occurred. Neil Davies's observation is supported by compelling independent evidence in the form of the Bomba report. This is another revealing piece of evidence which goes a long way in illustrating, amongst others, the appealing state of waste materials and housekeeping at the project site. Item 7 of the Bomba report states.

> 7.3. Keadaan barangan dibasemen yang berselerak dan tidak tersusun mengganggu dan melambatkan tindakan bomba.

From the photographs attached to the Bomba report, much of these materials were inflamable. More significantly, the Bomba report attributed the cause and spread of fire to bad housekeeping. At item 93 the Bomba reported:

> 9.3. antara sebab-sebab berlaku kebakaran dan kemerebakan api adalah …
>
> 9.4. Bad housekeeping terdapat timbunan tin-tin cat yang tidak tersusun serta tabung-tabung gas 'Acetylene, timbunan-timbunan barang yang mudah terbakar. Dalam erti kata lain, basemen ini dijadikan tempat simpanan (stor) bahan-bahan binaan pihak kontraktor.

Neil Davies also attached photographs of the condition of the basement which illustrate the extremely appalling condition in term of housekeeping. This is consistent with the Bomba's observations. The only conclusion that can be drawn from those observations is that there was no regular clearance of waste material and more importantly, other inflammable material from the site. This is a clear breach of item 4 of Condition 29.

Item 5 of Condition 29 provides for 'hot work permit'. In full, item 5 stipulates:

> A permit to work system is implemented for all contractors to engage in hot work of any kind such as, not limited to:
>
> - grinding, cutting or welding operation
>
> - use of blow lamps and torches
>
> - application of hot bitumen or any other heat producing operation.

For this issue, it is important to first understand why it was so critical that a hot work permit be implemented and what was the nature of the permit that was contemplated.

The starting point is to examine the Putrajaya Holding Safety Manual, which includes an Appendix "A" – ie, a document entitled – "Putrajaya Holdings Fire Emergency Procedures". The introduction section of this document states that it is a requirement of the Project insurers that comprehensive Fire Emergency Procedures are set up by each construction package. It is therefore clear that the fire condition (Condition 29) was an important element in the entire project and was stipulated as insurer's requirements. The Manual then provides in explicit terms, that the hot work permit was mandatory. This is set out under the heading "Welding and Burning" at cl. 9.5:

> Welding and/or burning work shall only be done under the control of a Hot Work Permit.

This is repeated in Appendix "A" at cl. 4.9.0 under the heading - "Hot Work" which provides as follows:

> 4.9.1. Set up and detail a "Hot Work" permit system which shall cover
>
> - welding (all types)
>
> - cutting
>
> - burning
>
> - soldering or braising

- grinding
- use of abrasive wheels
- any sparks or naked flame

An example of a hot work permit is included in appendix "3".

Appendix 3 in the specimen hot work permit. This provides in detail, the various check list which must be issued and signed by a responsible person employed by the contractor and appropriately dated. This system only allows for hot work to commence after a hot work permit in this form has been issued and signed. This is a very critical safety procedure in a highly dangerous location such as a large building under construction. A list of checks has to be done on various safety aspects before the permit is issued. The plaintiff as the contractor, would therefore have been clear as to what their responsibilities were under the Manual which expressly stipulated that the fire procedures were to comply with the insurer's requirements.

Now, lets turn to the evidence in the present case. The most significant evidence is that there is a clear admission on the part of the plaintiff that they did not have any hot work permit system at the basement area where the fire occurred. This can be seen from the plaintiff's letters dated 23 November 1999 and 17 December 1999. In both these letters, Mr. Gan Peng Teng, the Senior Project Manager of the plaintiff state that there was no hot work permit system as, according to him, "this was only a temporary storage area". Since Condition 29 stipulates the requirement of a hot work permit system to minimise risk of fire, it did not matter that the basement was a temporary storage area. In fact, it cannot be disputed that the hot work were carried out there as the Bomba found considerable quantities of hot work materials there. With this condition there is a clear breach of Item 5 of Condition 29.

Mohan Ram claimed in his evidence that there was a hot work permit system which entailed the use of a certain form. He specifically referred to a particular document which contains a form entitled "Gas Cutting Monthly Inspection Report". A quick perusal of this form shows clearly that it is not a form containing safety checklists to be complied with before hot work was carried out. It is instead, an inspection list, relating to inspection of hot work equipments. The form suggests that it is a monthly inspection report. By no stretch of imagination can this be a hot work permit. Later, in the midst of trial, Mohan Ram produced another document (P8) and claimed that was the form which constituted the how work permit. Again, this document (P8) is obviously not a hot work permit.

As a whole, the court in convinced that there was indeed no hot work permit system. This is yet another breach of Condition 29.

Item 3 of Condition 29 provides that opening for lift shafts, services ducts and other voids are to be provisionally closed as soon as possible but not later at the commencement of fit out work.

There are evidence by Neil Davies that in his physical inspection at D5, although fit out work were in progress, the lift shaft were not sealed. This evidence were not challenged. This being the case, the plaintiff has clearly breached item 3 of Condition 29.

Item 6 of Condition 29 provides as follows:

> Storage of materials for constructions or erection shall be subdivided into storage not exceeding the value stated below per storage unit. The individual storage unit shall be either 50 m apart or separated by fire proof walls.
>
> All inflammable materials and especially all inflammable liquids and gases shall be stored at sufficiently large distance from the property under construction or erection and any hot work.

The presence of inflammable materials within the basement car park is clearly made out. The Bomba reports (together with the photographs attached thereto) clearly illustrate the presence of a considerable amount of inflammable material kept within the basement car park. In item no: 9.3.1 of the reports, the Bomba confirmed that there were tins of paint, oxy acetyelene canisters and other inflammable materials within the areas where the fire occurred. In his physical inspection, Neil Davies noted that the storage of these inflammable was not within fire proof walls, but partitions made of plywood. On those evidence available, clearly the Plaintif was in breach of item 6 of Condition 29.

The evidence of breach of Condition 29 by the plaintiffs is overwhelming, particularly items 1, 2, 3, 4, 5 & 6. As has been pointed out, Condition 29 read together with General Condition 3 is a condition precedent. As such, the well established principles applicable to the effect of a breach of a condition precedent must be applied. The principle is that the condition precedent must be strictly complied with, failing which, no liability arises under the policy. This is so even if the breach of the condition precedent does not give rise to any prejudice on the part of the Insurer (defendants, in this case).

The court shall now turn to deal with the plaintiff's case on Condition 29.

Condition 29 – Incapable Of Performance

The plaintiff first contended that the terms of Condition 29 are incapable of performance. From this, it is understood that the plaintiff is saying that they could not, with reasonable diligence, comply with Condition 29.

Condition 29 was incorporated into the policy documents at the outset when the 1st defendant tendered for the business to provide the insurance package. No protest was raised either by the principals or the plaintiff as main contractors. Condition 29 was referred to the brokers who represented the insureds. The brokers did not protest its inclusion. It was included with their agreement. It is therefore highly improbable that all parties, experienced in the business, could have accepted the inclusion of Condition 29 into the policy, if its terms were incapable of performance. In the two plaintiff's letters dated 23 November 1999 and 17 December 1999 the senior project manager, Mr. Gan Peng Teng, did not indicate that the terms of Condition 29 were incapable of performance. Instead, he made explicit statements that the various requirements in Condition 29 had been complied with. In the course of trial, no evidence was adduced by the plaintiff to demonstrate how the terms of Condition 29 could not be performed. Throughout the period when the insurance subsisted the plaintiff did not even once, raise the issue that Condition 29 was incapable of performance Condition 29 contains terms as to fire safety measures which are similar to the principal's (Putrajaya Holdings) Safety Manual. The Safety Manual was directed to all contractors, which would have included the plaintiff. There was no indication at all that the plaintiff had ever raised the issue that the fire safety measures in Condition 29 were incapable of performance.

Looking at some of the relevant terms of Condition 29, it is at once clear that each and every requirement can be properly observed and performed. Item 1, for example, it is surely possible to install sufficient number of functional fire extinguishers at suitable location at the project site. For item 2 – it is equally possible that regular inspections be conducted at the cabinets containing the hose reels and fire extinguishers. All that was needed was a team perhaps led by the Safety Officer of the plaintiffs. Item 3 – it is also possible to close or seal up all openings for the lift shafts, service ducts etc. on the commencement of fit out work. As per item 4 – for the hot work permit, there is no doubt that this system could have been employed. Indeed it is wellknown in the industry that hot work system is commonly employed in all areas where hot work are carried out. It is not a system peculiar to construction and certainly not something unusual or novel.

These are basic, albeit, detailed fire safety measures which were required under Condition 29. The plaintiff's suggestion that these requirements are incapable of performance must therefore be rejected.

Condition 29 – Vague and Ambiguous

The next point raised by the plaintiff is that the terms of Condition 29 are vague and ambiguous and therefore unenforceable.

The court had examined the clear words used in Condition 29. There is simply nothing vague or ambiguous, about the entire provisions. The plaintiff called no witness to give evidence that Condition 29 is vague and ambiguous. Instead, Mohan Ram, the plaintiff's Safety Officer, in his witness statements claimed that the plaintiff had complied with Condition 29. Mr. Gan, the plaintiff's senior project manager, in his letters of 23 November 1999 and 17 December 1999 also did not say that Condition 29 was vague and ambiguous.

The defendant's witness, Zakri Mohd Khir in his evidence in-chief, stated explicitly that Condition 29 was modeled on the fire policies of Munich Re (a leading global re-insurer) and has been and still used in various parts of the world. This evidence has not be challenged at all. If Condition 29 is vague and ambiguous, this could hardly have been possible. In the present case, the said Condition 29 had been accepted and assented to by the Principals (Putrajaya Holdings) brokers and all the other co-insurers. This simply does not get well with the plaintiff's contention that Condition 29 is vague and ambiguous.

The court is satisfied that there is no ambiguity in Condition 29. Therefore the rule of 'contra proferentum' as alleged by the plaintiff is not applicable. This rule must not be used to create an ambiguity where none exists.

(see: (i) *London & Lancashire Fire Insurance Co. v. Boland* [1924] AC 836;

(ii) *Alder v. Moore* [1961] 2 Lloyds Law Report 325).

The basic presumption is that the words should receive their ordinary and natural meaning, and this is displaced only when there is a real ambiguity either appearing on the face of the policy or revealed by extrinsic evidence.

(see: (i) *Condogianis v. Guardian Assurance & Co* [1921] AC 125;

(ii) *Yorke v. Yokshire Insurance Company* [1918] 1KB 662).

If the meaning of the words is reasonably clear it must be given full effect even if it operates harshly against the assured.

(see: *Woolford v. Liverpool CC* [1968] 2 Lloyds Reps 256).

The position of the law is clear. Where the meaning of the words used are clear (as in Condition 29), effect must be given to it. One should not strain the language to find an ambiguity when none exists. The words used in Conditions 29 are plain and simple. No technical words or complex phrases are used. There is no ambiguity. Therefore, the plaintiff's allegation that Condition 29 is vague and ambiguous cannot stand and must be rejected.

Issue: Whether The Defendants Were Estopped From Relying Or Have Waived Their Rights To Rely On Condition 29 To Repudiate Liability Under The Policy.

The court shall now deal with the plaintiffs' case based on estoppel/waiver. The plaintiff contended that the defendant had knowledge of the breaches from the reports issued by the risk managers, Asia Pacific Risk Management Center (APRMC). The plaintiffs said that since the defendants knew about the breaches through APRMC Reports, and did nothing, they are now estopped from or have waived their rights to rely on the breaches to repudiate liability.

Before examining the evidence in relation to estoppel/waiver in the present case, the court shall highlight first on the legal position. It is, at the outset, necessary for the plaintiff to prove that the defendants had full knowledge of the breaches. The defendants' knowledge of the breaches must be full and complete, before waiver or estoppel can be asserted. This is best illustrated by Justice Woolf in *Victor Melik & Co. Ltd. v. Norwich Union Fire Insurance Society Ltd* [1980] 1 Lloyds Rep 523, when he said:

> When he heard from Mr. Melik, as I am satisfied he did, that the alarm was not going to be repaired, Mr. Kemp did not communicate again with the insurers, and if there was going to be any reliance upon a waiver or an estoppel here, in my view, it was essential that the fact should be brought to the knowledge of the insurers if they were gong to be in a situation where they were not going to be entitled to rely on the terms of the policy which they were otherwise entitled to reply upon. That really means that what happened here was at best the giving of information to the insurers of a limited nature. There was not full knowledge, and, what is more, there was no inactivity in these circumstances is insufficient to amount to a waiver. My view as to waiver also applies to estoppel. Estoppel can be by conduct. The conduct can be such as to give rise to a representation that the particular term of the policy will not be relied upon. Here, there was nothing which in fact could amount to such a representation.

In *Chong Soo Sin v. Industrial & Commercial Insurance (M) Bhd* [1992] 1 MLJ 636, the court considered the issue of waiver of a breach of warranty. In that case, the insured contended that the insurer had knowledge of the breach through its agents but waived the right to rely on the breach. On the question of knowledge, Justice Siti Norma Yaakob (as she then was) ruled that even when the breach had been communicated to the sub-agent, there was no actual knowledge on the part of the insurer. The implication of this is clear – it must be shown that the insurer had full and actual knowledge of the breach before waiver can be asserted.

Knowledge of the breach cannot be imputed to the defendants simply because the circumstances suggest that there is a possibility of a breach of Condition 29. This is especially so since the plaintiff was contractually bound to comply with Condition 29. It was not for the defendants to remind the plaintiffs to comply.

(see: *Arterial Caravans Ltd v. Yorkshire Insurance Co Ltd* [1973] 1 QB 169).

In the present case, it is for the plaintiffs to comply with Condition 29; not for the defendants to remind them to comply.

The requirement that the insurer must have full knowledge of the breach is further illustrated in case of *Locker & Company Ltd v. Western Australian Insurance Company Ltd* [1936] 54 LLR 211. where the court held on the requirement of full knowledge, as follows:

> There must be, in the first place, full knowledge of the circumstance, and, knowing the circumstances, the insurers must do some act which, apart from the policy, they are not entitled to do ... Now, the full circumstances, that is to say, the fact of the non-disclosure were not known until the beginning of October

The evidence in the present case indicates that the defendants had no knowledge of the breach of Condition 29, at all. The APRMC report cannot be taken to have imputed knowledge of the breach to the defendants. Indeed Zakri Mohd Khir (the defendants witness) testified that since inception of the policy on 25 July 1999 to the date of the fire on 16 August 1999, he did not receive any report from APRMC. Further, he said, he did not receive any advice from APRMC of any breach of Condition 29. If one looks at the APMRC Report, assuming that it was submitted to the defendants, it is still very far from showing that the defendants could derive any knowledge from the report about any breach of Condition 29 by the plaintiffs. APRMC provided a value-added risk management service which the defendants arranged for. They had no obligations to provide this value-added services but did it as part

of the project package to value add. The role of APRMC was not confined to surveying fire risks. In fact, fire only occupied one section of the report. Even when the section on fire is examined (s. 6.6), nothing in there to suggest that there was any breach or non-compliance of Condition 29. It must remembered that the law requires full knowledge. Section 6.6.(a) of the APRMC Report suggests that when viewed externally there did not appear to be presence of any dangerous flammable liquid. Similarly, at s. 6.6(b) it was reported that there was no unusual storage of low flash point solvents which may cause explosion. At s. 6.6.(c), APRMC reported on fire extinguishers. It simply said that there were a number of fire extinguishers within the project site (location not specified). These cannot attribute knowledge of breach of Condition 29.

The court is satisfied that the APRMC Report does not in any way contain any materials to suggest that there were breaches of Condition 29. There is simply no knowledge on the part of the defendants of the breaches of Condition 29 by the plaintiff, much less full knowledge. Therefore, the plaintiff reliance on waiver/estoppel is absolutely untenable.

Other Issues Raised

Settlement Of Previous Claims

The plaintiff also relied on the various claims which the defendants had paid previously. They contended that somehow, settlement of these claims constituted waiver on part of the defendants.

The court cannot agree with this contention. There is no law that simply because insurer have settled a claim previously, he cannot hereby repudiate a subsequent claim. Each claim is treated differently based on the facts and circumstances that give rise to the claim. Insurer can repudiate any claim if there are grounds to do so. In the present case, looking at the previous claims, most of them are not even fire claims. They are relatively minor claims. They are different from the claim in the present action. As illustrations the previous claims are for damages done by contractors, damages due to faulty design, damages from collapse, damages to culvert. So different are these claims from the present fire claim, that it is simply impossible to suggest that settlement of these claims can set up a waiver against the defendants.

Authority To Repair/Interim Payments

The plaintiffs also suggested that since the defendants gave authority to the plaintiff to proceed with repairs, that amount to a waiver of the breach. Again the court cannot agree with such suggestion.

To start with, it is common for insurer to conduct adjustment of claim pending determination of liability. Just because the defendants instructed adjusters to assess the damages did not mean that the defendants waived the breach committed by the plaintiffs. More significantly, it was made clear by the defendants that the adjustment for repairs were made strictly without prejudice to liability. The claim manager of the 1st defendant, Mr. Lim Gein Hin in his evidence said:

> Part of Neil Davies' work involved assessing the various claims to ensure that they were reasonable in terms of quantum. It was however made clear to the Plaintiffs that the involvement of adjusters was entirely without prejudice to the issue of policy liability.

The adjusters also, in their letter 22 September 1999 had stated that:

"Please note that our actions are without prejudice to insurers position on liability." The 1st defendant themselves made it absolutely clear that the plaintiff could proceed with repairs or reinstatement of the damages works, on a without prejudice and without admission of liability basis. There is therefore no merits in the plaintiff's contentions that the defendants waived their rights to rely on the plaintiff's breaches just because they allowed the repairs to proceed.

As to the interim payments, these were also made on the same basis ie, without prejudice and without admission of liability. In his evidence Mr. Lim Geim Hin, the 1st defendant's claims manager stated that in one of the meetings, the plaintiffs requested the defendants to consider making an interim payment pending the completion of investigation. In his affidavit of evidence-in-chief, he stated that:

> As far as insurers were concerned, any payment under the policy must be dependent on policy liability. Only after liability was established would the quantum be finalised and payment made. As such, when the Plaintiffs requested that we consider making interim payment, I indicated that we were willing to consider it subject to policy liability being established. I stressed this clearly to the Plaintiffs at the meeting of 9.9.19999. This was the consistent position which I took all through.

This position was corroborated by the adjuster's advice which they set out in their report of 7 October 1999 where it is said in explicit terms that. "It is to be noted that this proposed payment is strictly subject to insurer's considerations on application of policy liability to the claims." This was further corroborated by Zakri Mohd Khir (at Q27 of his affidavit of evidence-in-chief) when he said that the 1st defendant had indicated that they were willing to consider the plaintiff's request for interim payment, subject entirely to liability being

established under the policy. The plaintiff's contention that the defendants waived their rights by agreeing to consider interim payments, is therefore entirely unmeritorious.

Condition 29 – Not Material to the Loss

The plaintiffs also contended that even if there were breaches of Condition 29, these were not material to the loss.

The court cannot agree with this contention. Where there is a breach of condition precedent, the breach need not prejudice the insurers. As such, even if the breach is not material to the loss, the insurer is still entitled to repudiate liability pursuant to the terms of the policy. This principle was illustrated in *Pioneer Concrete (UK) v. Employers Mutual* [1985] 1 Lloyds Rep 274. In the present case, on the evidence, the breaches of Condition 29 was indeed, material. The Bomba report shows that due to the failure to dispose the waste and inflammable materials regularly, the fire was allowed to spread rapidly. Further, this aspect of bad housekeeping also impeded the firemen to carry out fire fighting effectively. Neil Davies, has also observed in his investigation, that the presence of waste materials and inflammable items caused the fire to spread rapidly. Accordingly, the contention by the plaintiffs that the breach of Condition 29 was not material to the loss must fail.

Bank Negara Malaysia (BNM) Guidelines

In their submissions, the plaintiffs relied heavily on the contention that the defendants had failed to comply with BNM Guidelines in handling the claims. The plaintiffs argued that BNM Guidelines have the force of law and therefore statutorily and contractually binding on the defendants. The plaintiff further argued that BNM Guidelines provide, *inter alia*, that an insurer shall not deny a claim merely on the ground of technical breaches of warranty or policy conditions which are not material or unconnected to the circumstances of the loss, unless fraud is suspected. To the plaintiff, BNM Guidelines therefore have altered the well established common law principles that where there is a breach of warranty or condition precedent, insurer is entitled to repudiate liability and it matters not that the breach has no connection with and is not material to the loss. In the present case, the plaintiff contended that the fire is fortuitous and there was no fraud or arson. As such the plaintiff contended that the defendants are not entitled to repudiate liability based on the breach of Condition 29.

The said BNM Guidelines cited by the plaintiffs is known as the claims settlement guidelines dated 25 February 1995 issued by the Insurance Regulation and Supervision Departments of Bank Negara Malaysia (BNM). The guidelines under the heading "Coverage" at p. 2 provides that they are required to be

observed by all general and composite insurance companies in relation to their general insurance business. The relevant part of the said Guidelines relied upon by the plaintiffs is under heading "settlement" at p. 9 which provides:

> ... An insurer should not deny a claim merely on grounds of technical breaches of warranty or policy conditions which are not material or unconnected to the circumstances of loss, unless fraud is suspected …

The said BNM Guidelines were issue by BNM under s. 201 of the Insurance Act 1996 (the Act) which empowers BNM to issue Guidelines, circulars or notices in respect of their Act relating to the conduct of the business and affairs of the licencee (insurer)."

Even assuming that the said BNM Guidelines have the force of law (being subsidiary legislations), the court is of the view that the relevant paragraph at p. 9 of the Guidelines (cited above) does not cover the situation in the present case. In other words, in repudiating their liability under the policy, the defendants did not breach the said provisions of the BNM Guidelines. The said Guidelines prohibit the Insurer from denying a claim merely on the grounds of technical breaches of warranty or policy conditions which are not material or unconnected to the circumstances of the loss. The key words in the said Guidelines are: "**technical breaches** of warranty of policy conditions which are not material or unconnected to the circumstances of loss." In order to be caught under the said Guidelines, the breaches in question must be in the nature of 'technical breaches' and such 'technical breaches' must be 'not material or unconnected to the circumstances of loss.' In other words, an insurer is not caught under the said Guidelines if the breaches are not 'technical' in nature and/or are material or connected to the circumstances of loss.

In the present case, the court has illustrated above that Condition 29 is a condition precedent in the policy which must be strictly complied with by the plaintiff. They are substantive conditions, not merely technical in nature. The court has also illustrated that there are breaches of Conditions 29 on the part of the plaintiff. The plaintiff had failed to comply with certain provisions of Condition 29. These breaches are not technical in nature. The court has also illustrated that those breaches were material and connected to the circumstances of the fire and the loss. Such being the case, the court is satisfied that the defendants were right in repudiating liability under the policy. The defendants are not prohibited from doing so under the said BNM Guidelines as alleged by the plaintiff, and therefore there is no breach of the said BNM Guidelines by the defendants in repudiating liability under the policy in the present case.

Conclusion

For all the reasons set out above, the court hold that the defendants had lawfully repudiated liability by reason of breaches of Condition 29 by the plaintiff. As such, the plaintiff's claim against the defendants (on liability) in this action is dismissed with costs.